UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

ROSS ISLAND SAND & GRAVEL COMPANY.

Employer

And Case 36-RC-6202

TEAMSTERS LOCAL #81, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN OF AMERICA, AFL-CIO[1]

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, the undersigned makes the following findings and conclusions.[3]

SUMMARY

On March 24, 2003, the Petitioner filed the instant petition seeking a unit of all drivers employed by the Employer at its Portland, Oregon facilities and not presently represented by Teamsters Union Local 162 or any other labor organization. The Employer contends that the unit sought by the Petitioner is inappropriate because it does not address the issue of the placement of new hires and because the unit sought by the Petitioner would adversely impact the Employer's rights under an agreement with Local 162.[4]

Based on the record as a whole, I conclude that the unit sought by the Petitioner is an appropriate "residual" unit. Accordingly, I shall direct an election in a "residual" unit of drivers who are not represented by Local 162.

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[1] The name of the Union appears as amended in the hearing.

[2] Both parties timely filed briefs, which were duly considered.

[3] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[4] The parties stipulate that all other employees, dispatchers, office-clerical employees, guards, and supervisors as defined in the Act, should be excluded from any unit found appropriate .

Below, I have set forth a section dealing with the facts, as revealed by the record in this matter and relating to general background information about the Employer's operations, about its recognition agreement with Local 162 and about its current operations. Following the Facts section is a restatement of the Parties' respective positions, an analysis of the applicable legal standards in this case and a section setting forth the direction of election.

1.) Facts

A.) Background

The Employer is a State of Oregon corporation engaged in the production and delivery of sand, gravel, concrete and related products. The Employer has at least four facilities located in Portland, Oregon: the Vanport, Albina, and Tait manufacturing plants; and a truck berthing and maintenance facility located on McLoughlin Boulevard. The manufacturing plants manufacture dry mix and plastic (ready mix) concrete. Drivers drive the finished product to various commercial or residential sites using a variety of trucks. The Employer uses flatbed trucks to haul its dry mix; bulk trucks, tractor-trailers and/or tankers, if a configuration is necessary, to deliver fly ash and other bulk or flowing material; and ready mix trucks, either conventional mixers, booster mixers or trailer mixers, to deliver plastic (ready mix) concrete. Charles Steinwandel is the Employer's executive vice president, treasurer, general manager, and was the sole witness at the hearing.[5]

The Employer presently employs about 40 drivers. Although it is not clear, it appears that Local 162 presently represents 22 to 26 of the 40 drivers pursuant to a strike settlement agreement signed by the Employer and Local 162 in 1992, and amended by them in 1994 and, again, in 2001.[6] Petitioner seeks a unit of the remainder of the drivers, some 18 to 28 drivers. The petition states there are 22 drivers in the unit sought by Petitioner, testimony at the hearing in this matter indicates 18 unrepresented drivers,[7] while Employer Exhibit 2, from the hearing, indicates there are 28 unrepresented drivers possibly covered by the petition.

B.) The Strike Settlement (Recognition) Agreement

In 1992, Local 162 and the Employer signed a strike settlement agreement that, in terms of recognition, limited the bargaining unit represented by Local 162 to "employees employed in job specifications" at the Employer's Tait and Vanport facilities, and specifically excluded employees employed at the Albina plant from Local 162 representation. According to the agreement, Local 162 drivers would be given preference for commercial type work performed by the Employer. However, the Employer retained the exclusive right to determine which work is commercial and which work is residential in nature.

Also, in the 1992 agreement, Local 162 agreed that, for 17 years starting from the 1992 agreement, it would not seek representation of employees other than those at the Employer's Tait and Vanport plants. In line with this agreement, Local 162 expressly agreed that for 17 years from the 1992 agreement, it would not seek representation of employees at the Albina facility and that it would not seek representation of any employees at any new

[5] The record also identifies Warren Anderson as the Employer's general manager.
[6] The Employer did not submit the 1994 amendment into the record.
[7] The Employer, in its brief, essentially sought to correct the record which referred to "18" unrepresented drivers when, correctly, the witness stated "A-team" and not the number, 18. The Employer witness referred to the unrepresented drivers as "A-Team" drivers.

facility the Employer may acquire or establish by any means other than by an RC petition filed with the NLRB.[8]

In this agreement, the Employer also has the sole discretion to assign Local 162 represented employees to work at any of its facilities, provided they are paid in accordance with the agreement it has with Local 162. At its sole discretion, the Employer may also assign any of its unrepresented drivers to work at the Tait and Vanport plants at rates determined by the Employer.

In 2001, the Employer and Local 162 amended the recognition language of their strike settlement agreement, to state the following:

> (1) The Bargaining Unit at present is 26 drivers. Attrition by any means (excluding temporary lay-off or temporary illness and injury) will reduce the employment of the Bargaining Unit members to 22 drivers and 26 vehicles; and this attrition will be a direct ratio, i.e., 26 drivers - 30 vehicles, 25 drivers - 29 vehicles; 24 drivers - 28 vehicles, etc.
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> (2) This foregoing amendment has the same longevity as the Strike Settlement Agreement as delineated in paragraph #6, that is, 17 years from the date of signing that Agreement.

C.) The Employer's Current Operations

In terms of work situs, drivers represented by Local 162 currently and generally berth the Employer's trucks at the Vanport and McLoughlin Boulevard facilities. According to the Employer, trucks are no longer frequently berthed at the Tait plant. The Employer's unrepresented drivers may berth trucks at the Vanport plant on "rare occasions." However, the largest berthing site for the Employer's trucks, especially for overnight berthing, is at its McLoughlin Boulevard location, where it appears that both sets of drivers berth trucks. [9]

Drivers are dispatched from the McLoughlin Boulevard and Vanport facilities. Dispatches from other facilities occur "far less frequently," but it is unclear as to why drivers may be dispatched from sites other than McLoughlin Boulevard and Vanport. The record indicates that the same dispatchers who dispatch Local 162 drivers also dispatch the unrepresented drivers. The record also indicates that Bonnie Barnes, supervising dispatcher, and Robert Hagen, truck superintendent, "collectively" supervise both Local 162 and the balance of unrepresented drivers along with Barnes' and Hagen's supervisors, Rick Grobbert, general superintendent and Warren Anderson, general manager.[10] However, it is not clear whether the two sets of drivers share the same or have separate immediate supervision.

Unlike unrepresented drivers, Local 162 drivers are assigned work, laid off, and recalled on the basis of seniority. It appears that Local 162 drivers are assigned "commercial

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[8] The record is unclear as to whether the McLoughlin Boulevard facility is a new facility. In any event, Local 162 has expressly disclaimed an interest in representing any of the employees petitioned-for by Petitioner.

[9] Thus, it appears based on the testimony at the hearing and the 2001 amendment to the 1992 strike settlement agreement, that the Employer and Local 162 are no longer strictly adhering to the geographic scope language of the 1992 strike settlement agreement's recognition language.

[10] No evidence or stipulation was presented at the hearing as to the statutory supervisory status of these individuals. In any event, neither party seeks to include them in the unit; therefore, they are excluded from the unit.

work" which generally consists of driving to manufacturing or business sites such as hotels, motels or to state or federally sponsored sites such as highway construction sites. However, if there are not enough Local 162 drivers to handle the amount of commercial work, unrepresented drivers may be assigned such work. How often unrepresented drivers perform "commercial" work is not specified.

Unrepresented drivers are generally assigned "residential" work. Residential work apparently involves driving to single or multiple dwelling sites. If there are not enough unrepresented drivers to handle all the residential work, the Employer can assign such work to Local 162 drivers. How often Local 162 drivers perform "residential" work is also not specified. However, it appears that Local 162 drivers and unrepresented drivers essentially work similar shifts.

Both sets of drivers receive benefits such as health and retirement. Yet, Local 162 drivers receive their benefits from Teamster plans while unrepresented drivers receive their benefits from other providers. The plans differ, but it appears the benefits offered are relatively similar.

Both sets of drivers have the same holidays and receive holiday pay, if they work on those holidays. Both groups get up to 4 weeks of vacation, depending on the number of hours worked, although the hours required of Local 162 drivers' to earn vacation are less than the work hours required of the unrepresented drivers.

Local 162 drivers are paid a minimum of $16.20 an hour. Concrete mixer drivers represented by Local 162 also receive a productivity incentive based on the cubic yards delivered per hour worked. Unrepresented drivers' pay is based on the cubic yards per hour delivered, with different pay per hour based on the type of product delivered. At the hearing in this matter, the Employer's Executive Vice President testified that he considers the "totality" of pay between the two driver groups to be about the same.

2.) Positions of the Parties

Petitioner seeks a unit of all of the Employer's unrepresented truck drivers. The Employer contends that the unit sought by the Petitioner is inappropriate because it seeks drivers who perform substantially the same work as the drivers represented by Local 162. The Employer asserts that the only appropriate unit is an expansion of the existing bargaining unit by either union organization, voluntary recognition, or a by a unit clarification petition. The Employer further contends that the unit sought by the Petitioner fails to account for the placement of new hires by the Employer and seeks to limit the Employer's rights under its strike settlement agreement with Local 162.

3.) Analysis

The primary issue framed by the record and the parties' respective positions is whether the unit sought by the Petitioner is an appropriate unit. In the *Boeing Co*., 337 NLRB No. 24 (2001), the Board described its policy with respect to determining appropriate units:

> The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the

> parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. See, e.g., *Overnite Transportation Co*., 331 NLRB No. 85, slip op. at 2 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).

Nothing in the National Labor Relations Act requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate,'' that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Bartlett Collins Co*., 334 NLRB No. 76 (2001); *Overnite Transportation Co.,* 322 NLRB 723 (1996); *Morand Bros. Beverage Co.,* 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); *Federal Electric Corp*., 157 NLRB 1130 (1966); *Parsons Investment Co.,* 152 NLRB 192 fn. 1 (1965); *Capital Bakers*, 168 NLRB 904, 905 (1968); *National Cash Register Co*., 166 NLRB 173 (1967); *NLRB v. Carson Cable TV,* 795 F.2d 879 (9th Cir. 1986); *Dezcon, Inc*., 295 NLRB 109 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that request does not exist.'' *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores*, 160 NLRB 651 (1966). Indeed, "the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins Co*., supra.

Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See, for example, *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422–423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). The Board will pass only on the appropriateness of units that have been argued for. *Acme Markets, Inc*., 328 NLRB 1208 (1999).

A petitioner's desire as to unit is always a relevant consideration but cannot be dispositive. *Marks Oxygen Co.,* supra; *Airco, Inc.,* 273 NLRB 348 (1984). Obviously, a proposed bargaining unit based on an arbitrary, heterogeneous, or artificial grouping of employees is inappropriate. *Moore Business Forms, Inc*., 204 NLRB 552 (1973); *Glosser Bros., Inc.,* 93 NLRB 1343 (1951). Thus, when all maintenance and technical employees have similar working conditions, are under common supervision, and interchange jobs frequently, a unit including only part of them is inappropriate. *United States Steel Corp.,* 192 NLRB 58 (1971).

The discretion that is granted to the Board in Section 9(b) to determine the appropriate bargaining unit is reasonably broad, although it does require that there be record evidence on which a finding of appropriateness can be granted. *Allen Health Care Services*, 332 NLRB No. 134 (2000). The only statutory limitations are those pertaining to professional employees (Sec. 9(b)(1)); craft representation (Sec. 9(b)(2)); plant guards (Sec. 9(b)(3)); and extent of organization (Sec. 9(c)(5)).

Beyond the general policy statements of law noted above, the Board will examine the community of duties and interest of the involved employees when making appropriate unit determinations. Specifically, the Board has held that when the interests of one group of employees are dissimilar from those of another group, a single unit is inappropriate. *Swift & Co.*, 129 NLRB 1391 (1961). In making a determination on the appropriateness of the petitioned-for unit, the Board weighs various community of interest factors, including:

> [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications,

> training and skills; differences in job functions and amount of working time spent away from the employment or plant situs…the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

However, where a portion of a workforce is already represented, the Board, first, evaluates petitions to represent remaining employees to determine whether the petitioned-for employees share a separate and distinct community of interest apart from the represented unit employees. If the community of interest of the petitioned-for employees is not separate and distinct such that they could constitute an appropriate separate unit, the Board secondly determines whether they constitute an appropriate residual unit. *Carl Buddig & Co.*, 328 NLRB 929 (1999). A group of employees omitted from established bargaining units constitutes an appropriate "residual" unit, provided the unit includes all the unrepresented employees of the type covered by the petition. *Carl Buddig & Co.*, supra; *Fleming Foods*, 313 NLRB 948, 949 (1994). See also, *American Radiator & Standard Sanitary Corp.*, 114 NLRB 1151, 1154-1155 (1955).

In the instant case, the Petitioner seeks a unit of drivers who have been excluded from the unit of drivers represented by Local 162 since about 1992. Thus, the first inquiry is whether the petitioned-for unit of unrepresented drivers shares a separate and distinct community of interest apart from the unit of drivers represented by Local 162. In this regard, the record reveals that both driver groups perform the same duties, driving the same sort of trucks, under shared supervision (whether that supervision is immediate or common overall supervision), and receive relatively the same benefits and pay. The record is silent as to contact between the two groups; however, both groups of drivers primarily berth their trucks at the McLoughlin Boulevard facility and at some of the Employer's other facilities in the Portland area. Both groups transport the same product, and to some extent, transport product to the same sites. Although the record indicates that Local 162 drivers generally transport product to commercial sites and unrepresented drivers generally transport product to residential sites, apparently, the work performed by the drivers in either circumstance is virtually identical. Regardless, the Employer has assigned drivers from each group to transport product to destinations generally transported by the other group.

Unlike unrepresented drivers, Local 162 drivers are assigned jobs, laid off and recalled by seniority. Other differences between the two groups of drivers are that they have different pay formulas, receive fringe benefits from different sources, and earn vacation days using different, although similar, formulas. Since 1992, Local 162 and the Employer have bargained collectively for a unit of drivers who generally make Employer deliveries to commercial sites while drivers who often truck Employer product to residential sites have been unrepresented since at least 1992.[11]

The Board has found separate driver groups appropriate at a single employer. See, e.g., *School Bus Services*, 312 NLRB 1 (1993) (separate paratransit driver unit appropriate excluding school bus drivers). However, such separate units were found appropriate because they had, for example, different shifts, separate licensing requirements, different training, separate management, specialized equipment, operated in different locations, and had a prior bargaining history. Many of these same factors are not present here. In particular, Local 162 drivers and unrepresented drivers appear to work the same shifts and

[11] I note that the record does not indicate what the bargaining history was prior to the 1992 strike settlement agreement.

types of equipment, to have the same licensing requirements and the same supervision, to work out of the same locations and to occasionally deliver product to the same types of Employer customers.

The instant case appears to be closer to those driver cases where the Board found separate driver units were fractured units. In *Transerv Systems*, 311 NLRB 766 (1993), the Board found separate bicycle and driver units inappropriate. The bicycle messengers' distinct bicycle messenger skills, separate immediate supervision, increased exposure to hazards of traffic and weather, and little interchange with drivers was insufficient to warrant a separate appropriate unit where the messengers and drivers performed the same functions, deliveries involved both a messenger and driver, there was frequent contact, and both shared similar terms and conditions of employment as well as common overall supervision.

Thus, many of the factors present in *Transerv Systems* are also present in the case at hand, namely, both groups of drivers perform the same functions, the drivers are interchangeable in terms of whether the delivery is residential or commercial in nature, contact between unrepresented drivers and Local 162 drivers does not appear to be based in large part on whether a driver is unrepresented or represented especially in view of common berthing sites for trucks and the common sites where Employer product is picked up for delivery by drivers, and both drivers share substantially similar terms and conditions of employment as well as common overall supervision. In light of the above and the record as a whole, I find that the unrepresented drivers do not share a separate and distinct community of interest apart from the represented drivers.

The next inquiry is whether the unrepresented drivers constitute an appropriate residual unit. In the case at hand, the record clearly establishes that the Petitioner seeks a unit of all drivers who have been omitted from the established unit of drivers represented by Local 162 since about 1992. Consequently, the unit sought by the Petitioner constitutes an appropriate "residual" unit.

Under circumstances similar to those presented here, the Board has found a petitioned-for unit of employees appropriate whether or not they enjoy a separate community of interest from an existing unit. In *Eastern Container Corp.*, 275 NLRB 1537 (1985), the Board found a unit of unrepresented maintenance employees appropriate whether or not they enjoyed a separate community of interest from an existing production unit where the maintenance employees were the only employees who could appropriately be included in the existing production unit and the union representing the production unit did not seek to represent the maintenance employees. Because Local 162 has expressly disclaimed an interest in representing the residual unit of drivers, I find the petitioned-for driver unit to be appropriate regardless of whether the petitioned-for drivers enjoy a separate community of interest from Local 162 drivers.

The Employer asserts that the only appropriate unit is an expansion of the existing bargaining unit by union organization, voluntary recognition, or a unit clarification petition. I disagree because of the recognition granted by the Employer to Local 162 via the strike settlement agreement and its amendments, because Local 162 has expressly disclaimed an interest in representing the residual unit of drivers and the Petitioner does not seek to represent the drivers represented by Local 162. It is under this type of situation where the Board has granted a petition for a residual unit. In many residual unit cases, the deciding factor has been that the incumbent unions failed to demonstrate that they had a viable interest in representing the employees residual to their respective units. Such residual unit cases generally conform to an analogous Board policy enunciated since at least 1938 to dismiss petitions seeking certification as a bargaining representative of a group of employees

when the petitioner concedes that it does not presently contemplate the initiation of bargaining relations with the employer, but wished only to be in a position to do so if conditions arise making such action desirable. See *J&S Young, Inc.*, 9 NLRB 1164 (1938); see also *The United Boat Service Corp.*, 55 NLRB 671, 675 (1944). In short, the Board will not place employees in a position where they will not have the possibility of representation. If I were to concede to the Employer's argument regarding what constitutes an appropriate unit, I would effectively and impermissibly prohibit the residual unit of drivers from exercising their Section 7 rights under the Act because Local 162 has expressly disclaimed a desire to represent the residual unit of drivers and the Petitioner does not seek to represent the historical unit represented by Local 162. Additionally, to void the recognition granted to Local 162 by the Employer via the strike settlement agreement would also be unwarranted under the circumstances of this case. Balancing all these competing positions and rights leads me to the conclusion that directing an election in the residual unit of drivers is the best course of action under the circumstances of this case.[12]

With regard to the issue of the placement of new hires by the Employer in the event that the Petitioner is eventually certified as the exclusive representative of the unit of residual drivers, the record reveals that Local 162 essentially promised not to seek representation of the residual unit of drivers. Further, Local 162 and the Employer agreed to limit the unit represented by Local 162 to 22 employees. The parties also agreed to an attrition schedule to reach their goal of 22 drivers in the Local 162 represented unit. Thus, by this agreement, if the unit goes below 22 drivers, any newly hired drivers will be added to the existing unit represented by Local 162 until the 22-driver limit has been achieved. Likewise, if there are already 22 drivers in the existing unit, any newly hired drivers will be added to the residual unit of drivers.[13]

Regardless of my ultimate findings on the appropriate unit issue, the Employer asserts that any unit I find appropriate should not limit the rights the Employer retains under the existing collective-bargaining agreement it has with Local 162. This assertion is somewhat contradictory in that the Employer, as noted above, argues that I should set aside the Employer's recognition of Local 162 by directing an election in a unit of all the Employer's drivers while at the same time the Employer essentially argues that whatever action I take should insure that the management rights, granted under the strike settlement agreement and the amendments to the Employer, remain intact. Yet, the Board has held parties to their express promises, as long as they are not repugnant to the Act or policies of the NLRB. See *Lexington House*, 328 NLRB 894 (1999)(union held to its promise not to organize certain employees of the employer); see also, *Montgomery Ward & Co*, 137 NLRB 346

[12] The Employer's cite to *Gourmet Award Foods, Northeast*, 336 NLRB No. 77 (2001) is misplaced in contending that the unit is inappropriate because it places "drivers" in two separate units because, among other things, the facts that the Board dealt with in that case are significantly different from the facts in the case at hand. In *Gourmet Award Foods, Northeast*, the Board essentially dealt with a dispute between an Employer and a recognized union over the interpretation and application of their labor agreement and whether certain employees were covered by the agreement. Here, however, there is no dispute that the agreement between Local 162 and the Employer expressly restricts Local 162 from representing the residual unit of drivers. Moreover, Local 162 expressly disclaims an interest in representing the unit sought by the Petitioner, which does not seek to represent the drivers represented by Local 162. For these and other reasons, the Board's decision in *Gourmet Award Foods, Northeast*, is not applicable to the case at hand.

[13] The Employer contends that it has the unlimited discretion to hire additional drivers, above the number of 26, into the unit represented by Local 162. This discretion is not set forth in any of the documents submitted into the record in this case. I note, however, that Employer's contention is undermined by the terms of the 2001 amendment to the strike settlement agreement above, which effectively cut the number of drivers represented by Local 162 to 22 from 26. Drivers currently represented by Local 162, regardless of number, will continue to be represented by 162. However, any hiring beyond the number of 22 drivers will result in the new hire's or hires' inclusion in the residual unit.

(1962)(parties held to collective-bargaining agreement even though the agreement is not a bar to a third party petition). In the instant case, the record reveals no evidence warranting a Board attack on the recognition granted to Local 162 via the strike settlement agreement and subsequent amendments. Thus, I do not find the historical recognition granted by the Employer to Local 162 to be repugnant to the Act or contrary to Board policies. Additionally, as I noted above, the agreement between Local 162 and the Employer does not bind the Petitioner and/or the residual unit of drivers as it relates to the rights conferred by the Act upon them. To speculate further about the impact of a certification of the Petitioner as the exclusive bargaining representative for the residual unit of drivers and the Employer's legal obligations from that point forward, is neither warranted nor productive at this point and in this context.

There was also some discussion at the hearing as to the eligibility of three of the employees listed on Employer's Exhibit 2. Testimony as to Jose Marias, listed on Employer's Exhibit 2 as an A-team driver, indicates that his primary duty involved maintenance and he only drove a "small percentage of his time." There was also an indication that Dennis Seely and James White, also employees on the Employer's Exhibit 2, are possibly members of other unions or are otherwise dual-function employees. The foregoing essentially represents the extent and nature of testimony regarding these three individuals. Neither party truly briefed this particular issue. Thus, I find the evidence here insufficient to determine whether the three alleged dual-function employees' community of interest with the petitioned-for unit requires their inclusion. Consequently, I shall allow these three individuals to vote subject to challenge.[14]

On the basis of the foregoing and the record as a whole, I direct that an election be held in the following appropriate residual unit:

> All full-time and regular part-time drivers employed by the Employer at its Portland, Oregon facilities excluding all other employees, drivers represented by Local 162, dispatchers, office-clerical employees, guards, and supervisors as defined in the Act.

There are approximately 18 to 28 employees in the unit.

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[14] Where an employee performs two separate jobs for the same employer and in each job regularly spends a substantial portion of his work hours performing that job, that employee is considered a "dual-function" employee. See *Berea Publishing Co.*, 140 NLRB 516 (1963). Such dual-function employees may vote in an election even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. See, *Ansted Center,* 326 NLRB 1208 (1998); *Air Liquid America Corp*., 324 NLRB 661 (1997); cf *Davis Transport*, 169 NLRB 557 (1968)(alleged dual-function employees with only 3 percent or less of their time devoted to the type of work done by employees in the unit, had no such community of interest with them that would warrant their inclusion in the unit).

Even where there are two separately represented units, where time spent and work performed by a single dual-function employee in one job classification was distinct and separate from time spent and work performed in another classification, the Board found that employee was eligible to participate fully in both bargaining units in which the employee had a substantial interest. See *KCAL-TV*, 331 NLRB 323 (2000). To qualify as a "dual-function" employee, the functions performed in one unit cannot be the same functions performed in the other unit. See *KCAL-TV*, supra; *Benson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991).

4.) DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local #81, International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A.) Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off and on-call employees averaging 4 or more hours per week, in the calendar quarter preceding said payroll period. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B.) Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Subregional Office in Portland, Oregon, an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Subregional Office, 601 SW Second Avenue, Suite 1910, Portland, Oregon, on or before May 9, 2003. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (503) 326-5387. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Subregional Office.

C.) Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

D.) Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by 5 p.m., EST on May 16, 2003**.** The request may **not** be filed by facsimile.

DATED at Seattle, Washington this 2nd day of May 2003.

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Catherine M. Roth, Acting Regional Director
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